No. 79-693

In the Supreme Court of the United States

OCTOBER TERM, 1979

CONSUMER CREDIT INSURANCE AGENCY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-9a) is reported at 599 F.2d 770. The opinion of the district court (Pet. App. 22a-33a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1979. A petition for rehearing was denied

on August 8, 1979. The petition for a writ of certiorari was filed on November 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' Fourth Amendment rights were violated by the government's use of so-called "forthwith" subpoenas, directing the immediate production of petitioners' business records before a federal grand jury.

2. Whether the district court properly refused to compel the government to produce the person who provided information that led to the decision to make the grand jury subpoenas returnable forthwith.

STATEMENT

Petitioners are five insurance companies that shared offices at 514 Prospect Avenue in Cleveland, Ohio. On September 10, 1976, agents of the Federal Bureau of Investigation went to the Prospect Avenue address and served subpoenas on each of three employees of petitioners, all of whom were custodians of petitioners' business records. The subpoenas ordered the immediate production, before a federal grand jury sitting in the Northern District of Ohio, of petitioners' business books and records for the period from January 1, 1974 to September 9, 1976. After consulting with counsel, the custodians complied with the subpoenas. Six days later, petitioners moved for the return of the records under Fed. R. Crim. P. 41(e)

(A. 2-5).[1] The district court ordered the government to return the originals of the records to petitioners but permitted the government to make and retain copies of any or all of the records produced (Pet. App. 33a-34a). A divided panel of the court of appeals affirmed (Pet. App. 2a-21a).

1. On the morning of September 10, 1976, FBI Agent Terry Lyons, accompanied by two other agents, went to petitioners' offices and awaited the arrival of the persons to whom the three subpoenas were addressed. In addition to serving the subpoenas, the agents planned to execute a search warrant authorizing a search of the "top right hand drawer of a brown wooden desk used by Gennaro J. Orrico," one of the records custodians. The warrant authorized the seizure of an illegal firearm allegedly contained in the drawer (A. 10, 32).

Allen Wachs, another of the records custodians, arrived at the Prospect Avenue address at approximately 9:40 a.m. (A. 66-67, 92). Agent Lyons and Wachs were already acquainted as the result of a previous investigation (Pet. App. 3a). Agent Lyons approached Wachs as he entered the building. The agent identified himself and told Wachs that he wished to discuss certain of Wachs' business activities (*id.* at 3a, 23a). Wachs invited Agent Lyons, who by then had been joined by the other two agents, to his fifth floor offices, where nine or ten employees were already working. Wachs took the agents into

[1] "A." refers to the appendix in the court of appeals.

his own office, and Lyons served Wachs with the subpoena addressed to him (A. 69-71, 102; Pet. App. 3a, 23a). After Wachs had read the subpoena, Lyons served him with the search warrant for Orrico's desk (A. 71; Pet. App. 23a).

A few minutes later, Thomas Bosse, the third custodian of records, arrived. Wachs introduced him to the three agents, and Agent Lyons served Bosse with his subpoena. Lyons also showed Bosse the search warrant (A. 71-73). Bosse immediately telephoned his attorney, Robert Jackson (A. 73; Pet. App. 3a, 24a). He was unable to reach Jackson personally and spoke instead to Stephen Kalette, an associate in Jackson's law firm (A. 129, 171; Pet. App. 3a, 24a). The FBI agents did not attempt to prevent Bosse and Wachs from consulting with petitioners' counsel.

Meanwhile, Wachs took Agent Lyons to the desk specified in the search warrant. Lyons opened the top right-hand drawer and removed what appeared to be a firearm (A. 73-74; Pet. App. 3a n.1, 24a).[2] Bosse returned from his office and reported that petitioners' attorney would arrive shortly (A. 74). Wanting a government lawyer to be present, Agent Lyons sent for Strike Force Attorney Kenneth Bravo, who arrived a few minutes later accompanied by two FBI agents (A. 74; Pet. App. 3a, 34a). Kalette soon appeared and was introduced by Bosse as petitioners'

[2] The "firearm" proved to be only a replica, and it was returned.

attorney (A. 43, 74, 129, 181). The two agents who had come with Bravo then departed (A. 75).

Not long thereafter, Jackson himself arrived. He spoke with Bravo, conversed briefly with Kalette, Bosse, and Wachs, and examined the subpoenas and search warrant (A. 75-76; Pet. App. 4a, 25a). Subsequently, Jackson and Bosse went into Bosse's office for a private meeting, during which Jackson explained the meaning of the subpoenas, including the necessity of seeking the intervention of a federal judge either for enforcement or quashing of the subpoenas (A. 139-140, 219-222, 225; Pet. App. 27a). Jackson advised Bosse that he was not required to produce the documents (A. 225). Jackson "told [Bosse] that he could do one of several things. He could resist the subpoena physically by demanding that he would not deliver the records or he could acquiesce or cooperate with the subpoena [and] give the records without any resistance or he could acquiesce while [Jackson] had the opportunity to, or [his] office, to prepare a motion to quash the subpoena" (A. 220). After Jackson spoke to Bravo once again, Bosse decided "to acquiesce to the subpoena" and, at the same time, to have Jackson "start preparing a motion to quash" (A. 223).

Jackson and Bosse told the federal officers that they desired "to cooperate in the matter regarding the records requested by the subpoena to the best of their ability" (A. 76; Pet. App. 4a, 25a). Jackson and Bosse asked the federal officers to remain on the premises "to assist in identifying the records and documents listed in the subpoenas" and to eliminate

documents not needed to satisfy the subpoenas (A. 78; Pet. App. 4a, 25a).

Jackson left the premises at approximately 11:15 a.m., but Kalette remained at petitioners' office for the remainder of the day (A. 79, 81). Bosse and Wachs sorted and collected the subpoenaed records, and Kalette kept an inventory of the documents delivered to the grand jury (A. 83-84, 204-205). Bosse, Wachs, and Kalette "continued intermittently to express a desire to cooperate in satisfying the requirements of the subpoenas" (Pet. App. 25a). At no time did any of the three ask Bravo or the FBI agents to leave the premises (*ibid.*). At no time did Jackson, Kalette, Bosse, or Wachs refuse to produce any of the subpoenaed records. Neither Bravo nor the FBI agents "expressly insist[ed] that any of the records and documents be produced" (*ibid.*).

Shortly before the collection of documents was completed, Gennaro Orrico arrived at the office and was served with his subpoena (A. 82, 232). Orrico announced he would not go to the grand jury voluntarily (A. 234, 292). Bravo said he expected Orrico to comply with the subpoena and that, if he did not, the government would ask a federal judge to issue a warrant for Orrico's arrest (A. 292; Pet. App. 7a-8a). Bosse then spoke to Bravo privately; Bravo said that, although the grand jury proceedings were secret, an arrest of Orrico for contempt might be reported by the newspapers (A. 292-294; Pet. App. 7a-8a).

Petitioners' records were transported to the grand jury in a truck obtained by Agent Lyons, and Wachs,

Bosse, Orrico, Kalette, and the federal officers walked the short distance from petitioners' office to the federal courthouse (A. 106-107; Pet. App. 26a).

2. Six days later, petitioners, represented by new counsel, filed a motion to recover all the records that had been produced in response to the subpoenas. In an affidavit submitted in response to petitioners' motion, Agent Lyons stated that an informant had told him that "some of the records of [petitioner] corporations had, in the past, been destroyed and/or sent out of town when they were subpoenaed or it was thought that they might be subpoenaed" (A. 27). Agent Lyons explained that "[t]hese factors, plus the additional fact that [he] was told that some records were kept in pencil, accounted for the urgency of the situation and were the reason for the forthwith nature of the subpoenas" (*ibid.*). See also A. 86-87.

After a hearing, the district court held that petitioners' representatives complied voluntarily with the subpoenas. The court based this conclusion on "the totality of the circumstances, the continuous presence of [petitioners'] attorneys on the premises of 514 Prospect Avenue, and the active role of legal counsel in advising and influencing [petitioners'] decision to comply" (Pet. App. 29a). The court found that "the Government neither reviewed documents nor entered into any physical space without the express permission of [petitioners]" (Pet. App. 31a).

The court acknowledged but did not credit Orrico's testimony to the effect that he instructed the FBI agents to leave the premises and not to take any docu-

ments with them (A. 232-235; Pet. App. 26a, 31a). The court explained (Pet. App. 31a):

> [A]fter having observed the witnesses' manner of testifying, their candor or lack thereof; their intelligence, interest and bias, together with all other circumstances surrounding their testimony, the Court elects to assign greater credibility and weight to the Government's witnesses than to [petitioners'].

Furthermore, the court observed that Orrico was not the only custodian of petitioners' records, that Bosse and Wachs apparently also exercised authority over the subpoenaed documents, and that Bosse appeared to occupy a dominant position in relation to his co-workers. Accordingly, the court concluded that, even if Orrico did not cooperate voluntarily, compliance by Bosse and Wachs was sufficient to establish consent (Pet. App. 31a-32a).

The court formally denied petitioners' Rule 41(e) motion, but stated that "the great volume of documents subpoenaed from petitioners could understandably impede the operation of their business for a protracted period" (Pet. App. 33a). The court therefore ordered the government to return the originals of all documents produced but permitted the government to make and retain copies of any or all of the records (*ibid.*).

The court of appeals affirmed (Pet. App. 2a-9a). Because of its disposition on the merits, the court did not decide whether it had jurisdiction over petitioners' appeal (Pet. App. 5a-6a n.2). The court simply rejected petitioners' argument that the presence of the FBI agents on the premises "amounted to so high a degree of coercion under the circumstances as to nullify the otherwise proper effect of the subpoenas in producing the documents desired" (Pet. App. 8a). Like the district court, the court of appeals stressed that "the agents 'never entered into any physical space without the express permission of [petitioners],' and in fact remained upon an express invitation to do so" (*ibid.*). Moreover, the court remarked, "[i]t must be remembered that these were business offices, that the agents entered in the company of and with the permission of Wachs, that entry was in the daytime, and that there were other office employees present at the time, thus diminishing any impact of a show of force" (*id.* at 8a-9a).

The court of appeals noted that the originals of the subpoenaed records had already been returned to petitioners, and the court suggested that, to the extent petitioners' demand for return of the copies stemmed from a concern for their own privacy and the privacy of their clients, "their remedy at this stage is to seek a protective order in the district court under Rule 6(e), Fed. R. Crim. P." (Pet. App. 9a). In light of the court's holding that petitioners consented to the production of documents in response to the subpoenas, it did not reach the question whether the subpoenas were unreasonably broad (see *id.* at 9a. n.3).

Judge Weick dissented (Pet. App. 10a-21a). He took the position that the FBI agents should have left petitioners' offices as soon as they had served the

subpoenas and executed the search warrant. The agents' failure to do so, in Judge Weick's view, made the "forthwith" command of the subpoenas coercive (*id.* at 13a). Judge Weick emphasized that "[a]t no time did the agents or Special Attorney Bravo inform [petitioners'] custodians of the right to refuse to comply in order to seek to test the validity of the subpoenas" (*id.* at 14a). The dissenting judge also interpreted the evidence to show that the attorney Jackson "*never* advised that Bosse had the right to test the validity of the forthwith grand jury subpoenas by filing a motion in court prior to turning over the documents" (*id.* at 15a). For these reasons, Judge Weick would have held that "the District Court's conclusion that the compliance was voluntary is not supported by substantial evidence, and is clearly erroneous" (*id.* at 17a). Judge Weick would have ruled further that the subpoenas were "impermissibly overbroad and unreasonable" (*id.* at 20a), and he therefore would have ordered all copies of the subpoenaed documents returned to petitioners.

ARGUMENT

1. After hearing petitioners' motion for return of property under Fed. R. Crim. P. 41(e), the district court concluded that the property in question had not been illegally obtained by the government. In order to minimize any unnecessary interference with the conduct of petitioners' businesses, however, the court ordered the originals of all documents obtained pursuant to the subpoenas to be returned to petitioners,

while permitting the government to retain copies of those documents for use before the grand jury. Petitioners' appeal of the determination that the records had not been illegally obtained thus presented two significant threshold questions: First, since petitioners' records had been returned, unless the copies made by the government were petitioners' "property" within the meaning of Rule 41(e)—a question on which there is a division of opinion (see Pet. 16 n.11)—their claim would have been rendered moot by the return of their records. Second, there is considerable doubt about the circumstances in which the denial of a Rule 41(e) motion is appealable as a final order, especially where, as here, the property has been returned and the principal relief apparently sought by the appellants is the suppression of evidence for possible use in a criminal investigation or prosecution.[3]

Both of the foregoing questions involve difficult and to some extent unsettled legal issues, but they are of little moment in the context of the present case in light of the correct and essentially factual findings of the lower courts that petitioners' rights were not violated by the manner in which their records were obtained. Taking issue with those findings, petitioners

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[3] If petitioners are concerned, not with preventing the government's evidentiary use of the business records, but with avoiding improper disclosure of those records outside the judicial process, they could safeguard their privacy interests by seeking a protective order in the district court under Fed. R. Crim. P. 6(e). The court of appeals explicitly suggested this procedure (Pet. App. 9a).

contend (Pet. 15-21, 26-30) that their employees did not voluntarily consent to the production of records in response to the grand jury subpoenas. Rather, petitioners argue, Wachs, Bosse, and Orrico were illegally coerced into complying with the subpoenas, in violation of petitioners' Fourth Amendment rights.

This Court has settled that "[v]oluntariness is a question of fact to be determined from all the circumstances * * *." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973). The courts below carefully considered the factual question presented by petitioners and correctly concluded that the subpoena compliance in this case was voluntary. They relied, *inter alia*, on the facts that compliance was obtained only after extensive consultation with counsel, that counsel was present at petitioners' offices throughout the collection, identification, and production of documents, that the FBI agents entered petitioners' offices only at Wachs' invitation and without any prior mention of the subpoenas or search warrant (see A. 93, 265), and that the agents remained in the offices at the express invitation of petitioners' representatives, who wanted them to assist in identifying the subpoenaed documents. In addition, attorney Jackson advised Bosse that he was not required to produce the subpoenaed records, and the FBI agents' visit to petitioners' offices occurred during business hours, when other employees were present and working. Taken together, all these circumstances amply support the factual determination of the district court upheld by the court of appeals, and this Court should not depart from its normal practice of refusing to review the factual findings of two federal courts. *Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967).[4]

Petitioners' suggestion (Pet. 15, 17, 18) that the governments' use of subpoenas was improper because the FBI agents lacked probable cause to obtain a search warrant is insubstantial. A subpoena duces tecum is proper even when probable cause to seize documents is lacking, because the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). See also *United States* v. *Powell*, 379 U.S. 48, 57 (1964); *United States* v. *Bisceglia*, 420 U.S. 141, 148 (1975). The grand jury could not perform its function if probable cause were a prerequisite for the issuance of a subpoena. See *United States* v. *Doe*, 460 F.2d 328, 332 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973). See also *United States* v. *Dionisio*, 410 U.S. 1, 15-16 (1973). The FBI agents in the present case did not treat the subpoenas as the equivalent of warrants but instead gave the persons served ample time to contact counsel and

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[4] *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), and *In re Nwamu*, 421 F. Supp. 1361 (S.D. N.Y. 1976), both cited by petitioners (Pet. 19), are inapposite, because both cases involved governmental seizures of subpoenaed documents over the stated opposition of the persons to whom the subpoenas were addressed.

consider whether to comply—an opportunity that need not have been afforded had the agents been executing a search warrant for petitioners' records.

Petitioners further contend (Pet. 21-26) that their custodians' compliance was involuntary because the subpoenas were impermissibly broad. Relying on *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), petitioners maintain that, at least in the context of "forthwith" subpoenas, compliance can never be voluntary if the subpoenas are invalid. This contention is erroneous, because it ignores the critical difference between the search warrant at issue in *Bumper* and the subpoenas challenged here.

As the Court observed in *Bumper* (391 U.S. at 550), "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." Consent in such circumstances is meaningless, because the search will occur whether or not consent is given. By contrast, a subpoena, even a "forthwith" subpoena, permits the recipient to seek judicial intervention before compliance. When petitioners' representatives were served with the subpoenas in this case, they consulted with counsel and then chose to cooperate with the grand jury investigation. Counsel advised Bosse and Wachs that they could resist the subpoenas and refuse to comply; Bosse and Wachs did not exercise this option but produced the requested records. The voluntariness of their decision was not related in any way to the validity of the subpoenas. A person served with a

subpoena enjoys the same right to object whether the subpoena is defective or not. The court of appeals therefore properly concluded that petitioners' voluntary compliance defeated any objection to the government's acquisition of the companies' business records and made it unnecessary to consider the subpoenas' validity (Pet. App. 9a & n.3).[5]

2. Finally, petitioners contend (Pet. 35-37) that the district court should have compelled the government to produce the person who gave Agent Lyons the information that caused the grand jury to make

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[5] In any event, the subpoenas were proper. The subpoenas requested production of petitioners' business record covering a period of two years and nine months. They were not substantially different in scope from those considered and sustained in *Bellis* v. *United States*, 417 U.S. 85, 86, 97-98 (1974) ("all partnership records currently in your possession * * * for the years 1968 and 1969"), and *Wheeler* v. *United States*, 226 U.S. 478, 482-483, 489 (1913) ("all the cash books, ledgers, journals and other books of account of the company, and all copies of letters and telegrams * * * for and covering the period from October 1, 1909, to January 1, 1911"). See also *Application of Certain Chinese Family B. & D. Ass'ns*, 19 F.R.D. 97, 100 (N.D. Cal. 1956) ("The fact that all of the records [for a given period] are demanded does not in and of itself make the subpoena unreasonable or oppressive"). Petitioners are engaged in the insurance business, which is heavily regulated by the state (see Ohio Rev. Code Ann. tit. 39 (Page 1971)). Government regulations requiring extensive record-keeping and financial documentation exist in part to facilitate investigations of the kind undertaken by the grand jury. This Court "has recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 353-354 (1977), and cases there cited.

the subpoenas returnable forthwith. This argument is unavailing, because the courts below did not need to rule on the validity of the subpoenas in order to determine that petitioners' compliance was voluntary and the government's acquisition of business records therefore proper.

The person who provided information to Agent Lyons was in the witness protection program of the United States Marshals Service at the time petitioners' counsel sought to examine her. She had been under such protection long before petitioners' motion for return of property was filed (A. 260, 279-281). Petitioners' counsel informed the district court that he wished to question the woman because "[w]e feel that her testimony would shed light on the validity of the [search] warrant that was issued and under whose authority these officers came out to the premises" (A. 281). Petitioners' attorney also represented that the woman's testimony would show that none of the subpoenaed records would have been destroyed if the subpoenas had included a later return date (A. 283). The district court correctly ruled (A. 284) that production of the witness was not necessary. Agent Lyons testified at the hearing on petitioners' Rule 41(e) motion and was subject to cross-examination. This procedure is sufficient at a non-trial proceeding in which guilt or innocence is not at issue. *United States* v. *Matlock*, 415 U.S. 164, 174-175 (1974); *McCray* v. *Illinois*, 386 U.S. 300, 305-313 (1967). Moreover, even if the woman had appeared and testified as petitioners' counsel predicted, it would not have affected the district court's decision. That decision was based entirely on the voluntariness of the custodians' behavior in producing the subpoenaed records, not on the propriety of the "forthwith" subpoenas themselves.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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